DEPARTMENT OF HEALTH AND FAMILY SERVIES
DIVISION OF HEALTH CARE FINANCING
ADMINISTRATOR'S MEMO SERIES

NOTICE: 03-06

ISSUE DATE: 07/10/2003
DISPOSAL DATE: ONGOING
RE: Status of IM Agencies under the Health Insurance Portability and Accountability Act of 1996

To: County Departments of Human Services Directors
County Departments of Social Services Directors
Tribal Chairpersons/Human Services Facilitators
Tribal Economic Support Directors

From: Mark B. Moody, Administrator
Division of Health Care Financing

PURPOSE

The purpose of this memo is to clarify for Counties and Tribes the status of the Income Maintenance (IM) agencies and data contained in the client assistance for re-employment and economic support system (CARES) with regard to the privacy standards for health information under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA).

BACKGROUND

HIPAA (Public Law 104–191) was enacted to address the issues presented by the health care industry's increasing use of and reliance on electronic technology. This Act affords new rights to program participants concerning the use and disclosure of their private health information. HIPAA privacy regulations took effect on April 14, 2003. The Act also directed the United States Department of Health and Human Services (DHHS) to develop regulations on the security of electronic health information, which will be effective April 20, 2005.

HIPAA privacy regulations apply to all "covered entities." Covered entities are defined as including health plans, health care clearinghouses, and health care providers who transmit health information electronically in certain administrative transactions.

Counties are "covered entities" and must comply with HIPAA in the following situations.

- If they submit claims for health care or conduct other standard health care-related administrative transactions electronically.
- If they submit claims to Medicare, unless they are a small provider[1].
- If they meet the definition of "health plan" in providing or paying for health care in a county-funded program.
- As administrators of a county General Relief Medical program.

[1] A small provider is a provider of services with less than 25 FTE employees or a physician, practitioner, facility or supplier (other than provider of services) with fewer than 10 FTE employees.

- As Care Management Organizations in the Family Care program.
- As business associates of the Department of Health and Family Services (DHFS) in administering the Medicaid Home and Community Based Services waiver programs.
- As administrators of the Community Options Program (COP).

HIPAA privacy protection extends to certain types of "individually identifiable health information," defined in the regulations as protected health information (PHI), including demographic information collected from an individual, that is created or received by a covered entity and relates to:

- The past, present, or future physical or mental health or condition of an individual; or
- The provision of health care to an individual; or
- The past, present, or future payment for the provision of health care to an individual; or
- The identify of the individual or information for which there is a reasonable basis to believe it can be used to identify the individual.

POLICY

HIPAA, Medicaid and Local Agencies

Given the definition of a covered entity and individually identifiable health information, there has been widespread concern that HIPAA requirements would apply to local agencies operating the Medicaid program. There has also been concern that certain health data in CARES (e.g., disability information) would have to be protected in accordance with HIPAA standards.

The Medicaid program is defined in the regulations as being a type of "health plan." The DHFS, therefore, as the agency that administrator the Medicaid program, is a covered entity.

However, the U.S. DHHS has clearly indicated, when issuing HIPAA privacy regulations, that HIPAA does not apply to the local IM agencies that determine eligibility for Medicaid. DHFS has subsequently determined that no information in CARES is subject to HIPAA privacy requirements. Only post-enrollment information in the Medicaid Management Information System (MMIS) is subject to HIPAA requirements.

County/tribal IM agencies that determine eligibility for the Medicaid program are not considered by DHFS to be either a covered entity or a business associate of DHFS under HIPAA and, therefore, have HIPAA-exempt status. For an IM unit this HIPAA-exempt status means that:

- The individually identifiable information it possesses is not PHI subject to HIPAA privacy rules.
- Authorized access to CARES by multiple parties or for data exchanges between systems does not involve disclosures, which otherwise could require authorizations and accounting.

The impact of this interpretation is that ***county/tribal IM agencies are not subject to the HIPAA privacy regulations in the course of their operations for determining eligibility for Medicaid, BadgerCare or Family Care***, unless the county or tribe has designated their IM agency as a covered entity or a health care component of a hybrid entity.

The U.S. DHHS has also indicated that the exchange of information between the state agency administering the Medicaid program and the local agencies determining eligibility for Medicaid is not covered by HIPAA. This means that the exchange of eligibility and enrollment information between IM agencies and the Division of Health Care Financing, including the Disability Determination Bureau and the Medicaid fiscal agent (EDS) is not affected by HIPAA.

Medicaid Confidentiality Requirements Remain. While HIPAA privacy regulations do not pertain to IM agencies and to CARES, the confidentiality requirements concerning Medicaid eligibility information of applicants and recipients under other state and federal laws still apply. There is no change to the existing Medicaid confidentiality requirements and procedures which apply to IM agencies and their staff. Under federal law 42 USC 1396a (a) (7) and s. 49.45 (4) of the Wisconsin Statutes, the use or disclosure of any information concerning applicants and recipients of medical assistance not connected with the administration of this program is prohibited.

Local Agencies Designating Themselves As Hybrid Entities

Even though the U.S. DHHS has clearly indicated that HIPAA does not apply to IM agencies that determine eligibility for Medicaid, HIPAA privacy regulations apply to county/tribal human and social service agencies that administer health plans. These health plans could include the general relief medical program or the Indian Health Service. Counties and tribes may also be covered by HIPAA if they electronically bill a health plan for health care services that they provide. Because of these regulations, some counties and tribes are establishing themselves as a "hybrid entity" under HIPAA and designating the parts that are acting as health plans or providers as "health care components." A hybrid entity has the option of designating any part as a health care component, but HIPAA does not require the IM units to be so designated.

IM Agencies Designated as Health Care Components

DHFS has learned that some counties or tribes have designated or are considering designating their IM agencies as health care components. While each county or tribal government is ultimately responsible for designating its HIPAA covered entity and health care components, DHFS believes that a county or tribal agency that designates its IM agency as a health care component may find it very difficult to fully comply with HIPAA privacy and security requirements. For example, the individually identifiable health information these covered components place into CARES could be considered PHI. However, since DHFS is considering CARES to be supporting a function (eligibility determination) not covered by HIPAA, DHFS will not be modifying CARES for compliance with HIPAA security and privacy rules that would apply for IM agencies designated as health care components.

Similarly, "designated" local agencies may have to obtain signed authorizations from their Medicaid applicants and recipients before they could enter PHI into CARES because it could involve improper disclosures beyond their control. Such as sharing the information with Child Support and W-2 agencies. Any information shared about clients with another county IM agency may also need an authorization. IM agency staff would have to receive HIPAA privacy training. IM agencies would need written HIPAA privacy policies, business associate agreements, a privacy officer and a contact person for privacy issues. Unauthorized disclosures could be subject to civil and criminal penalties under the federal law.

It is strongly recommended that any county or tribe that has designated its IM agency as a health care component rescind this designation.

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